FOR ARGUMENT
Oct. 9, 2001

No. 00-1514

OCT 8 2001

IN THE

Supreme Court of the United States

LANCE RAYGOR AND JAMES GOODCHILD,
Petitioners,

v.

REGENTS OF THE UNIVERSITY OF MINNESOTA,
Respondent.

On Writ of Certiorari to the Minnesota Supreme Court

BRIEF OF THE NATIONAL CONFERENCE OF STATE LEGISLATURES, NATIONAL GOVERNORS ASSOCIATION, COUNCIL OF STATE GOVERNMENTS, NATIONAL ASSOCIATION OF COUNTIES, NATIONAL LEAGUE OF CITIES, INTERNATIONAL MUNICIPAL LAWYERS ASSOCIATION, INTERNATIONAL CITY/COUNTY MANAGEMENT ASSOCIATION AND U.S. CONFERENCE OF MAYORS AS *AMICI CURIAE* SUPPORTING RESPONDENT

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QUESTION PRESENTED

Whether 28 U.S.C. § 1367(d), which requires state courts to entertain state law claims that are barred by the State's statutes of limitations, is constitutional.

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INTEREST OF THE *AMICI CURIAE*

Amici are organizations whose members include state, county, and municipal governments and officials throughout the United States.[1] *Amici* have a compelling interest in legal issues that affect state and local governments.

One of the core attributes of state sovereignty is a State's power to organize a court system in accordance with its own policies and to prescribe the rules for litigation. A State's authority to regulate the workload of its courts is a fundamental component of this sovereignty. Statutes of limitation and tolling rules are one of the principal means by which a State controls the workload of its courts and prioritizes the enforcement of state-created rights.

The statute at issue in this case, 28 U.S.C. § 1367(d), requires state courts to entertain state law claims that the State's limitations laws prohibit them from hearing. This congressional commandeering of the state courts violates structural principles of federalism and is beyond the power of Congress. Because section 1367(d) is a serious and insupportable encroachment on a core component of state sovereignty, *amici* submit this brief to assist the Court in its resolution of this case.

SUMMARY OF ARGUMENT

"Statutes of limitations are not simply technicalities" but are "fundamental to a well-ordered judicial system." *Board of Regents v. Tomanio*, 446 U.S. 478, 487 (1980). Minnesota, like all States, has enacted a comprehensive set of statutes governing the timeliness of state-created causes of action

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[1] The parties have consented to the filing of this *amicus* brief and their letters of consent filed with the Clerk. This brief was not authored in whole or in part by counsel for a party, and no person or entity, other than *amici* or their members, made a monetary contribution to the preparation or submission of this brief.

litigated in the State's courts. The Constitution does not confer upon Congress the power to override those time limits in the manner attempted in 28 U.S.C. § 1367(d). The judgment of the Minnesota Supreme Court should accordingly be affirmed.

A. Article III does not grant power to Congress or the federal courts either to superintend the rules of procedure followed in state courts adjudicating state law claims or to override the substantive state law applicable to such claims. As this Court has recognized many times, the state courts derive their authority from state constitutions and the laws adopted thereunder. "The state courts are not, in any sense of the word, *inferior* courts, except in the particular cases in which an appeal lies from their judgment to this [C]ourt." *Ex parte Bollman*, 8 U.S. (4 Cranch) 75, 97 (1807) (Marshall, C.J.).

It has long been settled that state courts are creations of separate and independent sovereigns. This fundamental constitutional premise precludes any assertion by Congress of Article III power to regulate procedure in the state courts. As this Court explained in *Tarble's Case*, 80 U.S. (13 Wall.) 397, 407 (1871), "[i]n their laws, and mode of enforcement, neither [sovereign] is responsible to the other. How their respective laws shall be enacted; how they shall be carried into execution; and in what tribunals, or by what officers; and how much discretion, or whether any at all shall be vested in their officers, are matters subject to their own control, and in the regulation of which neither can interfere with the other."

The Constitution thus does not grant Congress general supervisory authority over the States in the formulation either of their common or statutory law or their rules of court procedure. It follows that section 1367(d) as applied to the facts of this case is not a valid exercise of Congress' power.

B. Numerous authorities support the conclusion that section 1367(d) exceeds Congress's powers. By its plain terms section 1367(d) displaces state tolling laws and policies in any case in which the State does not, by its own laws, give tolling effect to a prior filing of the state law claim in federal court. While Congress has adopted certain laws tolling state statutes of limitations in extraordinary situations, each was enacted under either the war power or the commerce power and thus provides no support for section 1367(d).

Unlike these other tolling provisions, section 1367(d) was enacted pursuant to Congress's Article III powers in order to aid the jurisdiction of the federal courts. *See* American Law Institute, *Study of the Division of Jurisdiction Between State and Federal Courts* 453-54 (1968) (quoted in Pet. Br. 24-25). The notion that Article III authorizes Congress to so grossly intrude upon the sovereign powers of the States to create rights and prescribe the procedures for enforcing them in their own courts is the product of a one-sided view of the federal-state balance and violates the fundamental structural principles of the Constitution.

Whether a State's statutes of limitations are deemed to be procedural (as they are for conflicts of laws purposes and the Full Faith and Credit Clause) or substantive (as under the *Erie* doctrine) is irrelevant. In either event, this Court's cases hold that the power to prescribe the time within which state-law claims shall be filed in the State's courts is a fundamental and historic attribute of the States' sovereignty that Congress cannot override pursuant to its Article III powers.

For example, in *Hawkins v. Barney's Lessee*, 30 U.S. (5 Pet.) 457, 466 (1831), the Court held that "[i]t is not to be questioned, that laws limiting the time of bringing suit, constitute a part of the lex fori . . . they are laws for administering justice; one of the most sacred and important of sovereign rights and duties." The Court has thus recognized the power of a State to control access to its courts by applying

its own statutes of limitations "even when the substance of the claim must be governed by another State's law." *Sun Oil Co. v. Wortman*, 486 U.S. 717, 723 (1988).

Similarly, the *Erie* line of cases, which addresses the substantive law to be applied when a state claim is adjudicated in federal court, establishes limits on the Article III power that preclude the application of section 1367(d)'s tolling provision in this case. As the Court recognized in *Guaranty Trust Co. of New York v. York*, 326 U.S. 99, 112 (1945), "[w]henever [a State's limitations] law is authoritatively declared by a State, whether its voice be the legislature or its highest court, such law ought to govern in litigation founded on that law, whether the forum of application is a State or a federal court."

The Court has recently reaffirmed that Congress may not require state legislative or executive branches to enact or administer federal regulatory programs. *See Alden v. Maine*, 527 U.S. 706 (1999). The authority to set their own agendas for legislative and executive action is one of the core components of the sovereignty retained by the States under the Constitution.

The courts are one of the principal institutions through which the State's legislative and enforcement priorities are carried out. Statutes of limitation are an important means by which a State controls the workload of its courts and prioritizes the enforcement of state-created rights. Protecting this core aspect of state sovereignty from federal interference is essential to the preservation of politically accountable government.

Nor is there any merit to petitioners' contention that Minnesota's non-tolling policy retaliates against federal litigants for seeking redress in the federal courts. This Court has upheld the use of state tolling rules even when their application has resulted in the dismissal of suits brought under the federal civil rights laws. If federal courts routinely

borrow state statutes of limitation even when the result is the dismissal of a federal claim, a state court does not engage in impermissible discrimination when it applies a forum-neutral tolling rule to a state-created right litigated in state court. In the absence of such discrimination, section 1367(d) is neither a necessary or proper exercise of Congress' Article III powers.

ARGUMENT

SECTION 1367(d) IS AN UNCONSTITUTIONAL ENCROACHMENT ON STATE AUTHORITY

The Court has long recognized that "the time after which suits or actions shall be barred, has been, from a remote antiquity, fixed by every [government], in virtue of that sovereignty by which it exercises its legislation for all persons and property within its jurisdiction." *M'Elmoyle v. Cohen*, 38 U.S. (13 Pet.) 312, 327 (1839). Thus, for nearly two centuries it has been established that " '[t]he period sufficient to constitute a bar to the litigation of stale demands, is a question of municipal policy and regulation, and one which belongs to the discretion of every government, consulting its own interest and convenience.'" *Sun Oil Co. v. Wortman*, 486 U.S. 717, 726 (1988) (quoting 2 James Kent, *Commentaries on American Law* 462-63 (2d ed. 1832)).

The Court has accordingly explained that "[s]tatutes of limitations are not simply technicalities" but are "fundamental to a well-ordered judicial system." *Board of Regents v. Tomanio*, 446 U.S. 478, 487 (1980). Moreover, "[i]n virtually all statutes of limitations the chronological length of the limitation period is interrelated with provisions regarding tolling, revival, and questions of application." *Johnson v. Railway Express Agency, Inc.*, 421 U.S. 454, 464 (1975).

Like all States, Minnesota has enacted a comprehensive set of statutes governing the timeliness of state-created

causes of action. *See* Minn. Stat. ch. 541; *see also id.* § 363.14(1)(a)(1). Minnesota, however, has not enacted a "savings" or "renewal statute," and thus a claim brought in a court that lacks jurisdiction does not toll the State's statute of limitations. *See Burnett v. New York Cent. R.R. Co.*, 380 U.S. 424, 431-32 & n.9 (1965); *see generally* Minn. Stat. ch. 541; *Bonhiver v. Graff*, 248 N.W.2d 291, 300 (Minn. 1976). This rule applies whether a suit is brought in the courts of another State, a foreign State, or the United States.

Petitioners seek to override this important state policy by invoking 28 U.S.C. § 1367(d) to toll their state-created claim because they brought it first in federal court. As explained below, section 1367(d) cannot be applied to save supplemental state law claims filed in federal court when the federal court lacks jurisdiction over the federal claim. While applying section 1367(d) in this case unconstitutionally intrudes on Minnesota's sovereign immunity,[2] the statute suffers from a far more fundamental constitutional flaw. The Constitution does not grant Congress the broad power to superintend either the substantive rules of state law or the rules of procedure in the state courts. Indeed, whenever section 1367(d) is applied to require a state court to adjudicate a state law claim that would otherwise be barred because the State has not enacted a savings statute, that application violates structural principles of federalism by denying the State the authority to create and administer its own laws. The judgment of the Minnesota Supreme Court dismissing petitioners' case should therefore be affirmed.

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[2] *Amici* fully agree with respondent's arguments that section 1367(d) violates the State's constitutionally protected sovereign immunity. *See* Brief of Respondent Regents of University of Minnesota, Sec. I.

A. The Constitution Does Not Grant Congress Supervisory Authority Over The Tolling Rules Applicable To State-Created Causes of Action Litigated In State Courts

1. "[O]ur Constitution establishes a system of dual sovereignty between the States and the Federal Government." *Gregory v. Ashcroft*, 501 U.S. 452, 457 (1991). "Although the States surrendered many of their powers to the new Federal Government, they retained 'a residuary and inviolable sovereignty.' " *Printz v. United States*, 521 U.S. 898, 918-19 (1997) (quoting The Federalist No. 39, at 245 (J. Madison)).

The Constitution's preservation to the States of a core of sovereignty is manifested in several ways. It is displayed implicitly by the grant to Congress of the limited, enumerated powers found in Article I, Section 8. *See Printz*, 521 U.S. at 919; *see also Gregory*, 501 U.S. at 457 (1991) ("The Constitution created a Federal Government of limited powers."); *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 421 (1819). It is made express by the text of the Tenth Amendment, which provides that "[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." As James Madison wrote:

> The powers delegated by the proposed Constitution to the federal government are few and defined. Those which are to remain in the State governments are numerous and indefinite. The former will be exercised principally on external objects, as war, peace, negotiation, and foreign commerce . . . . The powers reserved to the several States will extend to all the objects which, in the ordinary course of affairs, concern the lives, liberties, and properties of the people, and the internal order, improvement, and prosperity of the State.

The Federalist No. 45, at 296 (J. Madison) (Isaac Kramnick ed., 1987).

Where the Constitution does grant power to the federal government, that power is limited in a critical respect vis-à-vis the States. As the Court observed in *New York v. United States*, 505 U.S. 144, 166 (1992), "the Framers explicitly chose a Constitution that confers upon Congress the power to regulate individuals, not States." *See also Printz*, 521 U.S. at 919-20 ("the Framers rejected the concept of a central government that would act upon and through the States, and instead designed a system in which the State and Federal Governments would exercise concurrent authority over the people").

As the Court has explained:

> The great innovation of this design was that "our citizens would have two political capacities, one state and one federal, each protected from incursion by the other"—"a legal system unprecedented in form and design, establishing two orders of government, each with its own direct relationship, its own privity, its own set of mutual rights and obligations to the people who sustain it and are governed by it."

Printz, 521 U.S. at 920 (quoting *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 838 (1995) (Kennedy, J., concurring)). As Madison wrote: "[T]he local or municipal authorities form distinct and independent portions of the supremacy, no more subject, within their respective spheres, to the general authority than the general authority is subject to them, within its own sphere." The Federalist No. 39, at 258 (Isaac Kramnick ed., 1987).

The structure of the Constitution "thus contemplates that a State's government will represent and remain accountable to its own citizens." *Printz*, 521 U.S. at 920. This division of authority has many benefits, including enhancing citizen participation in the political process, "allow[ing] for more innovation and experimentation in government," *Gregory*, 501 U.S. at 458, and "secur[ing] to citizens the liberties that

derive from the diffusion of sovereign power." *New York*, 505 U.S. at 181 (quoting *Coleman v. Thompson*, 501 U.S. 722, 759 (1991) (Blackmun, J., dissenting)).

2. Article I, Section 8, of the Constitution sets forth Congress' powers. While clause 17 confers on Congress the power "[t]o exercise exclusive Legislation in all Cases whatsoever, over" the District of Columbia, and "to exercise like Authority over all Places purchased . . . for the Erection of" military and other installations, thus granting Congress police power over these areas, U.S. Const. Art. I, § 8, cl.17, the Constitution otherwise "withhold[s] from Congress a plenary police power that would authorize enactment of every type of legislation." *United States v. Lopez*, 514 U.S. 549, 566 (1995) (citing Art. I, § 8); *see also United States v. Morrison*, 529 U.S. 598, 618 n.8 (2000) ("[T]he principle that the Constitution created a Federal Government of limited powers, while reserving a generalized police power to the States, is deeply ingrained in our constitutional history.") (internal quotations and citations omitted).

The Court has further held that Congress has implied "power to make all laws necessary and proper for carrying into execution not only all the powers previously specified, but also all other powers vested by the Constitution in the government of the United States, or in any department . . . thereof." *Tennessee v. Davis*, 100 U.S. (10 Otto) 257, 263 (1880). The Court, however, has recently reaffirmed that " '[w]hen a "La[w] . . . for carrying into Execution" the [enumerated powers] violates the principle of state sovereignty reflected in the various constitutional provisions . . . it is not a "La[w] . . . *proper* for carrying into Execution the [enumerated powers]," and is thus . . . "merely [an] ac[t] of usurpation" which "deserve[s] to be treated as such."' " *Alden v. Maine*, 527 U.S. 706, 732-33 (1999) (quoting *Printz*, 521 U.S. at 923-24 (quoting The Federalist No. 33, at 204 (Hamilton) (C. Rossiter ed., 1961))).

The scope of Congress's authority with respect to the federal judicial power is similarly constrained. Under Article III, Congress indisputably has power to "ordain and establish" federal courts inferior to this Court. U.S. Const. Art. III, § 1. This includes the power to regulate the jurisdiction of, and the procedure to be followed in, the federal courts. *See Sibbach v. Wilson*, 312 U.S. 1, 655 (1941); *Livingston v. Story*, 34 U.S. (9 Pet.) 632, 656 (1835).

Article III does not, however, grant power to Congress or the federal courts either to superintend the rules of procedure in the state courts or to rewrite the substantive rules with respect to state-created causes of action. A long line of authority rejects the notion "that Congress could confer jurisdiction upon the State courts." *Claflin v. Houseman*, 93 U.S. (3 Otto) 130, 141 (1876); *Houston v. Moore*, 18 U.S. (5 Wheat.) 1, 27 (1820) (opinion of Washington, J.) ("I hold it to be perfectly clear, that Congress cannot confer jurisdiction upon any Courts, but such as exist under the constitution and laws of the United States. . . ."); *id.* at 67 (Story, J., dissenting) ("There is no pretence to say, that Congress can compel a State Court Martial to convene and sit in judgment on [a federal criminal] offense."). *See also* 1 James Kent, *Commentaries on American Law* 377 (New York, O. Halstead 1826) ("The doctrine seems to be admitted, that congress cannot compel a state court to entertain jurisdiction in any case.").

While a state court is required to enforce a federal cause of action where its jurisdiction is "adequate and appropriate," this obligation does not derive from a congressional conferral of jurisdiction but from the Supremacy Clause. *Testa v. Katt*, 330 U.S. 386, 394 (1947); *see also* The Federalist No. 82, at 459 (Hamilton) (Isaac Kramnick ed., 1987). The Court has expressly rejected the contention that state courts adjudicating a federal claim "become courts of the United States, exercising a jurisdiction conferred by Congress."

Minneapolis & St. Louis R.R. Co. v. Bombolis, 241 U.S. 211, 222 (1916). In *Bombolis*, the Court explained that its holdings that a state court with adequate jurisdiction must enforce a federal claim "in no sense implied that the duty which was declared to exist on the part of the state court depended upon the conception that for the purpose of enforcing the right the state court was to be treated as a Federal Court deriving its authority not from the State creating it, but from the United States." *Id.*

The Court recognized in *Bombolis* that the state courts derive their authority from state constitutions and state law. As Chief Justice Marshall explained almost two hundred years ago: "[t]he state courts are not, in any sense of the word, *inferior* courts, except in the particular cases in which an appeal lies from their judgment to this [C]ourt. . . . They are not inferior courts because they emanate from a different authority, and are the creatures of a distinct government." *Ex parte Bollman*, 8 U.S. (4 Cranch) 75, 97 (1807); *see also* The Federalist No. 82, at 459 (in taking cognizance of cases arising under federal statutes, state courts would exercise "the judiciary power" of their own government).

As Congress's authority to regulate the procedure in the federal courts is derived from its powers to create inferior federal courts and regulate their jurisdiction, its lack of power to confer jurisdiction on the state courts and the long-settled understanding that the state courts are creations of separate and independent sovereigns preclude any assertion of Congressional power under Article III to regulate procedure in state courts. The state and federal governments are of "distinct and independent character . . . within their respective spheres of action." *Tarble's Case*, 80 U.S. (13 Wall.) 397, 407 (1871). "Each has its separate departments; each has its distinct laws, and each has its own tribunals for their enforcement. Neither government can intrude within the jurisdiction, or authorize any interference therein by its

judicial officers with the action of the other." *Id.* at 406. As the Court further explained:

> In their laws, and mode of enforcement, neither is responsible to the other. How their respective laws shall be enacted; how they shall be carried into execution; and in what tribunals, or by what officers; and how much discretion, or whether any at all shall be vested in their officers, are matters subject to their own control, and in the regulation of which neither can interfere with the other.

Id. at 407-08.

Thus, in *Mondou v. New York, N.H. & Hart. Ry. Co.*, 223 U.S. 1 (1912), which preceded *Testa* in holding that state courts with adequate jurisdiction must enforce a federal cause of action, the Court was careful "to observe that there is not here involved any attempt by Congress to enlarge or regulate the jurisdiction of state courts, *or to control or affect their modes of procedure*." *Id.* at 56 (emphasis added). The Court further explained that the case involved "only [the] question of the duty of such a court, when its ordinary jurisdiction as prescribed by local laws is appropriate to the occasion and is invoked in conformity with those laws, to take cognizance of an action to enforce a right of civil recovery arising under the act of Congress and susceptible of adjudication according to the prevailing rules of procedure." *Id.* at 56-57. Moreover, in *Testa*, the Court noted the respondent's concession "that this same type of claim arising under Rhode Island law would be enforced by that State's courts" and that "[i]ts courts have enforced claims for double damages growing out of the Fair Labor Standards Act." 330 U.S. at 394.

To be sure, subsequent cases establish that state courts must apply a federal rule of procedure that is "part and parcel" of a federal cause of action. *See Dice v. Akron, Canton & Youngstown R.R. Co.*, 342 U.S. 359, 363 (1952) (internal quotation and citation omitted). Furthermore,

"where state courts entertain a federally created cause of action, the 'federal right cannot be defeated by the forms of local practice.'" *Felder v. Casey*, 487 U.S. 131, 138 (1988) (quoting *Brown v. Western R.R. Co. of Ala.*, 338 U.S. 294, 296 (1949)).

As the *Felder* Court recognized, however, "[*n*]*o one disputes the general and unassailable proposition . . . that States may establish the rules of procedure governing litigation in their own courts.*" 487 U.S. at 138 (emphasis added). *See also Hardware Dealers' Mut. Fire Ins. Co. v. Glidden Co.*, 284 U.S. 151, 158 (1931) ("the procedure by which [state-created] rights may be enforced and wrongs remedied is peculiarly a subject of state regulation and control").

Procedural rules, of course, constitute the *lex fori*. And because "they are laws for administering justice," which is "one of the most sacred and important of sovereign rights and duties[,] . . . a restriction" on a State's authority to control them would "materially affect both legislative and judicial independence." *Hawkins v. Barney's Lessee*, 30 U.S. (5 Pet.) 457, 466 (1831); *cf. M'Elmoyle v. Cohen*, 38 U.S. (13 Pet.) at 327 (noting "the now well understood rights of nations to organize their judicial tribunals according to their notions of policy"). Unless a State's sovereignty over its judicial process is no more than an empty shell, the rules of procedure which a State adopts for administering its own laws cannot be revised by Congress in an exercise of Article III power.

Consistent with this understanding, the Court has long recognized that the federal judicial power is of limited scope. In *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938), the Court repudiated *Swift v. Tyson*, 41 U.S. (16 Pet.) 1 (1842), recognizing the "fallacy underlying" its rule that federal courts "need not, in matters of general jurisprudence, apply the unwritten law of the state as declared by its highest court" and "are free to exercise an independent judgment as to what

the common law of the state is . . . ." 304 U.S. at 71, 79. *Erie*'s declared basis of decision was the Constitution's limitations on federal power:

> Except in matters governed by the Federal Constitution or by acts of Congress, the law to be applied in any case is the law of the state. And whether the law of the state shall be declared by its Legislature in a statute or by its highest court in a decision is not a matter of federal concern. There is no federal general common law. *Congress has no power to declare substantive rules of common law applicable in a state whether they be local in their nature or "general," be they commercial law or a part of the law of torts.* And no clause in the Constitution purports to confer such a power upon the federal courts.

304 U.S. at 78 (emphasis added). As Justice Field earlier wrote, "the constitution of the United States . . . recognizes and preserves the autonomy and independence of the states" in both "their legislative and . . . judicial departments. Supervision over either the legislative or the judicial action of the states is in no case permissible except as to matters by the constitution specifically authorized or delegated to the United States." *Baltimore & Ohio R.R. Co. v. Baugh*, 149 U.S. 368, 401 (1893) (Field, J., dissenting) (quoted in *Erie*, 304 U.S. at 78-79).[3]

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[3] Congress also has power under Section 5 of the Fourteenth Amendment to enforce the due process clause "by appropriate legislation." *See* U.S. Const. Amend XIV, § 5. The due process clause, however, is not implicated by a State's refusal to toll the limitations period applicable to a state claim when a plaintiff chooses to pursue it in the courts of another sovereign. Petitioners could have pursued both their state and federal claims in the state courts, which were open to them for the length of the Minnesota Human Right Act's relevant limitations periods. *See* Minn. Stat. § 363.06(3) (one year limitation period for claims brought as a civil action directly in state district court); *id.* § 363.14(1)(a)(1) (where person pursues administrative remedy, a civil action may be brought within 45 days of receiving commissioner's determination "that there is no probable cause").

As the foregoing demonstrates, the Constitution does not grant Congress a general supervisory authority over the state courts in the formulation of either common law or rules of procedure. That, as petitioners feebly argue, a congressional regulation of state court procedures seems like a "sensible and balanced solution to [a] problem," Pet. Br. 24, does not make it constitutional.[4] As explained below, section 1367(d) as applied in this case is not a valid exercise of Congressional power.

B. Section 1367(d) Exceeds Congress' Powers Under The Constitution

Section 1367(d) was enacted in 1990 as part of Congress' codification of the doctrines of pendent claim, pendent party, and ancillary jurisdiction into the doctrine of supplemental jurisdiction. *See* Charles A. Wright, *Law of Federal Courts* § 9, at 33-34 (5th ed. 1994). Section 1367(d) provides:

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[4] In *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89 (1984), the Court expressly rejected the argument that "considerations of judicial economy, convenience, and fairness to litigants . . . counsel against a result that may cause litigants to split causes of action between state and federal courts." *Id.* at 121 (internal quotations and citations omitted). As the Court explained, "[i]t may be that applying the Eleventh Amendment to pendent claims results in federal claims being brought in state court, or in bifurcation of claims. That is not uncommon in this area." *Id.* at 122. Furthermore, "such considerations of policy cannot override the constitutional limitation on the authority of the federal judiciary to adjudicate suits against a State." *Id.* at 123.

At a minimum, this Court's decision in *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44 (Mar. 27, 1996), called into question whether a federal court could exercise jurisdiction over an ADEA claim against a state entity. Petitioners received right-to-sue letters in June and July 1996. Pet. Br. 3. Prudence thus suggested that petitioners file their state and federal claims in both state and federal courts, and move to stay the state court action pending the resolution of any challenge to federal court jurisdiction.

> The period of limitations for any claim asserted under [1367(a) supplemental jurisdiction], and for any other claim in the same action that is voluntarily dismissed at the same time as or after the dismissal of the claim under subsection (a), shall be tolled while the claim is pending and for a period of 30 days after it is dismissed unless State law provides for a longer tolling period.

Judicial Improvements Act of 1990, § 310(a), Pub. L. No. 101-650, 104 Stat. 5089, 5114 (1990) (codified at 28 U.S.C. § 1367(d)). The provision seems to have received little attention in Congress other than the cursory statement buried in a House Report that its "purpose is to prevent the loss of claims to statutes of limitations where state law might fail to toll the running of the period of limitations while a supplemental claim was pending in federal court. It also eliminates a possible disincentive [sic] from such a gap in tolling when a plaintiff might wish to seek voluntary dismissal of other claims in order to pursue an entire matter in state court when a federal court dismisses a supplemental claim." H.R. Rep. No. 101-734, at 30 (1990), *reprinted in* 1990 U.S.C.C.A.N. 6860, 6876.

By its plain terms, section 1367(d) displaces state tolling laws and policies whenever a State does not give tolling effect to the filing of a suit in a court without jurisdiction—so long, of course, as a plaintiff files first in federal court. The statute cannot be sustained as an exercise of either Congress's express powers under Article I or its implied powers under Article III. Moreover, because the statute violates the Constitution's structural principles of federalism, it cannot be sustained under the necessary and proper clause.[5]

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[5] Congress apparently modeled section 1367(d) after a proposal made by the American Law Institute. *See* Brian A. Beckcom, Note, *Pushing the Limits of Judicial Power: Tolling State Statutes of Limitations Under 28 U.S.C. § 1367(d)*, 77 Tex. L. Rev. 1049, 1058 (1999); *see also* The American Law Institute, *Study Of The Division Of Jurisdiction Between State And Federal Courts* § 1386(b) (1969).

The ALI proposal states that:

> If any claim in an action timely commenced in a federal court is dismissed for lack of jurisdiction over the subject matter of the claim, a new action on the same claim brought in another court shall not be barred by a statute of limitations that would not have barred the original action had it been commenced in that court, if such new action is brought in a proper court, federal or State, within thirty days after dismissal of the original claim has become final or within such longer period as may be available under applicable State law.

Study of the Division of Jurisdiction § 1386(b), at 65. At least one ALI member expressed the dissenting view that it was unconstitutional for Congress to tell a state court, "You have got to hear and decide this case, just because the plaintiff unfortunately but wrongly started in the wrong court . . . no matter what your own supreme court and your own legislature tell you." Beckcom, 77 Tex. L. Rev. at 1061 n.89 (quoting ALI, Proceedings, 41st Annual Meeting 192-205 (1964)).

1. Throughout the nation's history, Congress has adopted several laws tolling state statutes of limitations. *See* An Act In Relation To The Limitation Of Actions In Certain Cases, 13 Stat. 123 (1864); Transportation Act of 1920, § 206(f), 41 Stat. 462; 50 U.S.C. App. § 8(c) (Trading with the Enemy Act); 50 U.S.C. App. § 525 (Soldiers And Sailors' Civil Relief Act Of 1940). Each of these statutes, however, was enacted in response to such national emergencies as the Civil War and First and Second World Wars. Article I explicitly grants Congress the power "[t]o declare [w]ar," "raise and support [a]rmies," "provide and maintain a [n]avy," "make [r]ules for the [g]overnment and [r]egulation of the land and naval [f]orces," and "provide for calling forth the [m]ilitia to execute the [l]aws of the Union, suppress [i]nsurrections and repel [i]nvasions." U.S. Const. Art. I, § 8, cls. 11-15.

As the Court observed in a challenge to the tolling provision enacted during the Civil War,

> The measures to be taken in carrying on war and to suppress insurrection are not defined. . . . [T]he power is not limited to victories in the field and the dispersion of the insurgent forces. It carries with it inherently the power . . . to remedy the evils which have arisen from [the conflict's] rise and progress. This act falls within the latter category. The power to pass it is necessarily implied from the powers to make war and suppress insurrections.

Stewart v. Kahn, 78 U.S. (11 Wall.) 493, 506-07 (1871). Likewise, the tolling provision of the Soldiers and Sailors' Civil Relief Act, 50 U.S.C. App. § 525, which remains in effect, is fully within Congress' powers to provide for the armed forces and their governance. *See* U.S. Const. Art I, § 8, cls.12-14.[6] The existence of these extraordinary provisions thus provides no support for the enactment of section 1367(d), which is not an exercise of the foregoing Article I powers.[7]

2. Petitioners adopt the ALI's view that section 1367(d) is a valid exercise of Congress's powers under Article III. *See* Pet. Br. 24-26. Petitioners quote the ALI's conclusory assertion–predicated on the assumption that a federal forum is invariably preferable to a state forum—that "[i]t is plainly appropriate, as an aid to the exercise of federal jurisdiction, to see to it that a plaintiff is not discouraged from seeking a

[6] While the tolling provision of the Transportation Act of 1920 was not enacted until after the conclusion of World War I, that provision addressed the effect to be given to the federal government's control of the railroads during wartime and was upheld as "a war measure." *Wenatchee Produce Co. v. Great Northern Ry. Co.*, 271 F. 784, 784 (E.D. Wash. 1921).

[7] Petitioners cite the Y2K Act's provision which tolled state statutes of limitations during the prescribed "notice and remediation period." *See* Pet. Br. 26 n. 36 (quoting 15 U.S.C. § 6606(e)(4)). Congress enacted this provision pursuant to its Article I commerce power. *See* 15 U.S.C. § 6601(b).

federal forum if he believes such a forum is available. One way to achieve this goal is to assure him that he will not lose his cause of action if his belief turns out to be erroneous." *Id.* at 24-25 (quoting ALI, *Study of The Division Of Jurisdiction*, 453-54).

This one-sided view of Congress's authority to legislate "in aid of the [federal] judicial power," ALI Study at 455, violates the fundamental structural principles of the Constitution. Whether a State's statutes of limitations are deemed to be procedural (as they are for purposes of conflicts of laws principles and the Full Faith and Credit Clause) or substantive (as they are under *Erie*) is irrelevant. Both lines of authority establish the core proposition that with respect to state-created causes of action, the power to "prescrib[e] the time within which suits shall be litigated in their Courts" is a fundamental and historic attribute of the States' sovereignty that Congress cannot override in an exercise of Article III power. *M'Elmoyle*, 38 U.S. (13 Pet.) at 327.

In *Hawkins* the Court observed that "[i]t is not to be questioned, that laws limiting the time of bringing suit, constitute a part of the lex fori of every country: they are laws for administering justice; one of the most sacred and important of sovereign rights and duties; and a restriction which must materially affect both legislative and judicial independence." 30 U.S. (5 Pet.) at 466. And in *M'Elmoyle* the Court explained that:

> It would be strange, if in the now well understood rights of nations to organize their judicial tribunals according to notions of policy, it should be conceded to them in every other respect than that of prescribing the time within which suits shall be litigated in their Courts. Prescription is a thing of policy, growing out of the experience of its necessity; and the time after which suits or actions shall be barred, has been, from a remote antiquity, fixed by every nation, in virtue of the

> sovereignty by which it exercises its legislation for all persons and property within its jurisdiction.

38 U.S. (13 Pet.) at 327.

Thus for nearly two centuries it has been established that "'[t]he period sufficient to constitute a bar to the litigation of stale demands, is a question of municipal policy and regulation, and one which belongs to the discretion of every government, consulting its own interest and convenience.'" *Sun Oil Co. v. Wortman*, 486 U.S. 717, 726 (1988) (quoting 2 James Kent, *Commentaries on American Law* 462-63 (2d ed. 1832)). Consistent with these principles, the Court has long recognized the power of a State to control access to its judicial forums by applying its own statutes of limitations, "even when the substance of the claim must be governed by another State's law." *Sun Oil*, 486 U.S. at 723. Accordingly, under the Full Faith and Credit Clause, a forum State has the right to apply its own statute of limitations to bar an action even if the State where the cause of action arose would allow it. *Wells v. Simonds Abrasive Co.*, 345 U.S. 514, 517 (1953) (citing *Restatement of Conflict of Laws* § 603 (1934)).

This rule is supported by the recognition that a State's authority to control the agenda in its courts is a fundamental attribute of its sovereignty. As the *Sun Oil* Court explained: "[a] State's interest in regulating the work load of its courts . . . certainly suffices to give it legislative jurisdiction to control the remedies available in its courts by imposing statutes of limitations." 486 U.S. at 730. While the Full Faith and Credit Clause only addresses State-to-State relations, *Tarble's Case* makes clear that as between the state and federal sovereigns, the "mode of enforcement" that either a federal or state sovereign adopts for its "respective laws" is a "matter[] subject to [its] own control, and in the regulation of which neither can interfere with the other." 80 U.S. (13 Wall.) at 407-08.

3. While the *Erie* line of cases has the specific purpose of determining what law must be applied when a state claim is adjudicated in federal court, it nonetheless manifests limits on the federal judicial power which prohibit the application of section 1367(d) to petitioners' state law claims in this case. As the Court recognized in *Erie*, "Congress has no power to declare substantive rules of common law applicable in a state whether they be local in their nature or 'general,' be they commercial law or a part of the law of torts. And no clause in the Constitution purports to confer such a power upon the federal courts." 304 U.S. at 78.[8]

The Court's cases applying the *Erie* doctrine conclusively establish that the federal courts must apply state statutes of limitations and tolling rules to a state law claim. The Court's cases likewise establish that Congress's implied powers under Article III to regulate the procedure in the federal courts do not include the sweeping power to displace state statutes of limitations and tolling rules which apply in the State's own courts.

In *Guaranty Trust Co. of New York v. York*, 326 U.S. 99, 108-09 (1945), the Court stated that "since a federal court adjudicating a state-created right . . . is . . . in effect, only another court of the State, it cannot afford recovery if the right to recover is made unavailable by the State nor can it substantially affect the enforcement of the right as given by the State." Because "a statute that would completely bar recovery in a suit if brought in a State court bears on a State-created right vitally and not merely formally or negligibly," the Court held that "if a plea of the statute of limitations would bar recovery in a State court, a federal court ought not

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[8] The *Erie* rule that "the law to be applied in any [diversity] case is the law of the state," 304 U.S. at 78, applies as well to state claims brought in federal court under supplemental jurisdiction. *See United Mine Workers v. Gibbs*, 383 U.S. 715, 726 (1966).

to afford recovery." 326 U.S. at 110. The Court further explained that:

> The source of substantive rights enforced by a federal court under diversity jurisdiction . . . is the law of the States. *Whenever that law is authoritatively declared by a State, whether its voice be the legislature or its highest court, such law ought to govern in litigation founded on that law, whether the forum of application is a State or a federal court and whether the remedies be sought at law or may be had in equity.*

Id. at 112 (emphasis added).

The issue of tolling is, of course, "closely related" to "the length of the limitations period." *Wilson v. Garcia*, 471 U.S. 261, 269 (1985). Following *Guaranty Trust*, the Court held that *Erie* requires that a federal court apply state tolling rules to a state tort claim. *See Ragan v. Merchants Transfer & Warehouse Co., Inc.*, 337 U.S. 530, 533-34 (1949). The issue in *Ragan* was whether a federal court suit had been commenced within Kansas's statute of limitations. *See id.* at 531-32. The petitioner argued that he had tolled the statute of limitations by filing his complaint in the federal district court within the prescribed time, *see* Fed. R. Civ. P. 3, even though service was not properly effected until several months after the expiration of the limitations period. *See* 337 U.S. at 531. Under Kansas law, however, "the requirement of service of summons within the statutory period was an integral part of [the] statute of limitations." *Id.* at 532.

The Court held that the suit was barred. While acknowledging that "the suit was properly commenced in the federal court" under the federal rules, the Court reasoned that because the "cause of action is created by local law, the measure of it is to be found only in local law . . . . It accrues and comes to an end when local law so declares." *Id.* at 533. A federal court, the Court explained, "cannot give [a state cause of action] longer life in the federal court than it would

have had in the state court without adding something to the cause of action. We may not do that consistently with *Erie*." *Id.* at 533-34.

Thirty years later the Court expressly re-affirmed *Ragan*'s holding that a federal court must apply state tolling rules in a lawsuit based on a state cause of action. *See Walker v. Armco Steel Corp.*, 446 U.S. 740 (1980). The Court rejected the argument that *Hanna v. Plumer*, 380 U.S. 460 (1965), had overturned *Ragan* and thus required that Fed. R. Civ. P. 3 be applied to displace Oklahoma's statutory requirement that actual service was required to toll the statute of limitations. *See* 446 U.S. at 749-51. The Court explained that "[t]here is no indication that the Rule was intended to toll a state statute of limitations, much less that it purported to displace state tolling rules for purposes of state statutes of limitations." *Id.* at 750-51. "In contrast," Oklahoma's statute "is a statement of a substantive decision by that State that actual service on, and accordingly actual notice by, the defendant is an integral part of the several policies served by the statute of limitations." *Id.* at 751. The Court held that because there was "no direct conflict between the Federal Rule and the state law, the *Hanna* analysis does not apply." *Id.* at 752.

Hanna held that a federal rule of civil procedure prevails in a direct conflict with relevant state law. But the federal rules of civil procedure apply only to proceedings brought "in the United States district courts." Fed. R. Civ. P. 1. *Hanna* further recognized that "*neither Congress nor the federal courts* can, under the guise of formulating rules of decision for federal courts, fashion rules which are not supported by a grant of federal authority contained in Article I or some other section of the Constitution [as] in such areas state law must govern because there can be no other law." 380 U.S. at 471-72 (emphasis added).

Thus, while "the constitutional provision for a federal court system (augmented by the Necessary and Proper Clause)

carries with it congressional power to make rules governing the practice and pleading *in those courts*," *id.* at 472 (emphasis added), and to "prescribe housekeeping rules *for federal courts* even though some of those rules will inevitably differ from comparable state rules," *id.* at 473 (emphasis added), *Hanna* does not support the conclusion that section 1367(d) is a valid exercise of Congress's Article III powers.[9] Indeed, *Hanna* does no more than recognize the traditional principle of conflicts that the forum is entitled to apply its own rules of procedure even when the substance of a claim is governed by another sovereign's law.

Section 1367(d) is not simply a rule of federal court procedure. While section 1367(d) tolls a state law claim during its pendency in the federal district court, its goes much further. By its plain terms it tolls a state law claim "for a period of 30 days after it is dismissed" by a federal court. It does so for the purpose of allowing plaintiffs who improperly bring suit in federal court to refile their claims in state court. *See* H.R. Rep. No. 101-734, at 30, 1990 U.S.C.C.A.N. at 6876. Section 1367(d) thus governs "the practice and pleading in" state courts. *Hanna*, 380 U.S. at 472. It is therefore an unconstitutional attempt to set the agenda of the state courts by overriding state statutes of limitations and tolling rules.

4. As explained above, state courts are required to hear federal claims where they have "adequate and appropriate" jurisdiction over analogous state claims. *See Testa v. Katt*, 330 U.S. 386, 394 (1947). Moreover, a state court adjudicating a federal claim is required to apply federal procedures that are part of the federal scheme. *See Felder*, 487 U.S. at 153. But the *Felder* Court also recognized that

[9] *Hanna* also applies to Congressional enactments governing procedure in the federal courts. *See Stewart Organization, Inc. v. Ricoh Corp.*, 487 U.S. 22, 26-27 (1988).

"[n]o one disputes the general and unassailable proposition . . . that States may establish the rules of procedure governing litigation in their own courts." 487 U.S. at 138. *See also Sun Oil*, 486 U.S. at 722 ("Since the procedural rules of its courts are surely matters on which a State is competent to legislate, it follows that a State may apply its own procedural rules to actions litigated in its courts."); *Hardware Dealers' Mut. Fire Ins. Co. v. Glidden Co.*, 284 U.S. 151, 158 (1931) ("the procedure by which rights may be enforced and wrongs remedied is peculiarly a subject of state regulation and control").

The Court has recently held that "Congress may not require the legislative or executive branches of the States to enact or administer federal regulatory programs." *Alden v. Maine*, 527 U.S. at 752; *see also Printz*, 521 U.S. at 935; *New York v. United States*, 505 U.S. at 188. The authority to set their own agendas for legislative and executive action is one of the core components of the residual sovereignty the States retain under the constitutional scheme. *See Printz*, 521 U.S. at 925-33; *New York*, 505 U.S. at 166-69. The retention of this authority—free from federal interference—is essential to the preservation of political accountability.[10]

[10] Petitioners' analogies to various ancient practices of England's courts are misplaced. *See* Pet. Br. 26-27 & nn. 37-38. In England, both the law and equity courts derived their power from the same source of sovereign authority—the king and parliament. The same holds true with respect to "inferior courts" and the courts of King's Bench. 1 William Blackstone, *Commentaries On The Laws Of England* 266 (George Sharswood ed. 1904) (the king "has alone the right of erecting courts of judicature" and "all jurisdictions of courts are either mediately or immediately derived from the crown, their proceedings run generally in the king's name, they pass under his seal, and are executed by his officers").

The courts of Minnesota, however, are not "inferior" courts. As Chief Justice Marshall explained, "The state courts are not, in any sense of the word, *inferior* courts, except in the particular cases in which an appeal lies from their judgment to this court." *Ex parte Bollman*, 8 U.S. (4 Cranch)

The courts are one of the principal institutions through which the State's legislative and enforcement priorities are carried out. Statutes of limitations are one of the chief means by which a State controls the workload of its courts and prioritizes the enforcement of state-created rights. *See Sun Oil*, 486 U.S. at 730 ("A State's interest in regulating the workload of its courts . . . certainly suffices to give it legislative jurisdiction to control the remedies available in its courts by imposing statutes of limitations.").

Disregarding the centuries-old recognition that "'[t]he period sufficient to constitute a bar to the litigation of stale demands, is a question of municipal policy and regulation, and one which belongs to the discretion of every government, consulting its own interest and convenience,'" *Sun Oil*, 486 U.S. at 726 (quoting *Kent's Commentaries*, at 462-63), Congress has taken the extreme step of ordering Minnesota's courts to entertain state law claims which its own legislature has barred them from hearing. Beyond this clear usurpation of Minnesota's sovereignty, such federal commandeering of state judicial resources has untoward consequences. In response, the State might be prompted to expend more money on judges, courtrooms, and other personnel. Or the State might do nothing, allowing the quality and speed of state court adjudication to decline. In either case, it is state officials rather than members of Congress who will be blamed for the increase in costs or the decrease in efficiency. Section 1367(d) thus violates the accountability principles of *Printz* and *New York*.

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at 97. Rather, they are courts of a co-sovereign, "'no more subject, within their respective spheres, to the general authority than the general authority is subject to them, within its own sphere.'" *Alden*, 527 U.S. at 714 (quoting The Federalist No. 39, p. 245 (C. Rossiter ed. 1961) (J. Madison)); *see also Ex parte Bollman*, 8 U.S. (4 Cranch) at 97 (state courts "are not inferior \courts because they emanate from a different authority, and are creatures of a distinct government").

As the foregoing demonstrates, the States' authority to set the agenda for their own courts is a historic and fundamental attribute of their sovereignty. To be sure, the States ceded a portion of this authority in the Constitution, but only to the extent that the Supremacy Clause prohibits state courts from refusing to hear a claim because of its federal source. *See Testa*, 330 U.S. at 394. Minnesota's non-tolling policy does not implicate this principle, where the source of the right is the State's own laws.

5. Petitioners further argue that Minnesota's non-tolling policy is functionally equivalent to "retaliation against federal litigants because they sought redress in federal court." Pet. Br. 25. According to petitioners, "[t]he refusal of state law . . . to toll a state limitations period while the plaintiff seeks to enforce that state right in federal court, although not the result of any improper motive, will have the same punitive impact as an intentional act of retaliation." *Id.* at 26.

Petitioners, however, can make no showing that Minnesota's non-tolling policy discriminates against litigants who file in federal court. Rather, the State's policy is a neutral rule which applies whether a litigant pursues a claim in the courts of another State, a foreign State, or the United States. Thus, to the extent there is a non-discrimination principle that applies to a state court litigant who previously sought redress in a federal forum, petitioners have not established that Minnesota's courts have discriminated against them because they exercised a federal right.[11]

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[11] Applying section 1367(d) to override a State's non-tolling policy would violate one of the fundamental principles of the *Erie* doctrine, *i.e.*, that "it would be unfair for the character or result of a litigation materially to differ because the suit had been brought in federal court." *Hanna*, 380 U.S. at 467. If a plaintiff sues a Minnesota defendant in the courts of another State and suffers dismissal for lack of jurisdiction, Minnesota's non-tolling policy would bar the plaintiff from refiling the action in Minnesota's courts. But if the plaintiff had sued in federal court and

Indeed, contrary to petitioners' suggestion, federal causes of action routinely borrow state statutes of limitations and tolling rules even when such rules disfavor plaintiffs. It "is commonplace in federal statutory law" that Congress does "not establish a statute of limitations or a body of tolling rules applicable to actions brought in federal court." *Tomanio*, 446 U.S. at 483. "When such a void occurs, this Court has repeatedly 'borrowed' the state law of limitations governing an analogous cause of action." *Id.* at 483-84 & n.3 (collecting cases). The Court has further held that "this 'borrowing' logically include[s] rules of tolling[.]" *Id.* at 485; *see also Johnson v. Railway Express Agency*, 421 U.S. at 463-64; *Wilson*, 471 U.S. at 269 (in § 1983 actions "the length of the limitations period, and closely related questions of tolling and application, are to be governed by state law") (footnote omitted).

Most significantly, the Court has upheld the use of state tolling rules even when their application results in the dismissal of suits brought under federal civil rights statutes such as 42 U.S.C. § 1981 & § 1983. *See Tomanio*, 446 U.S. at 492 (holding § 1983 action barred where State "has expressed by statute its disfavor of tolling its statute of limitations for one action while an independent action is being pursued"); *Johnson*, 421 U.S. at 462-67 (applying state statute of limitation and tolling rule to bar action brought under 42 U.S.C. § 1981). If federal causes of action routinely borrow state statutes of limitations and tolling rules even when doing so will result in the dismissal of a federal civil rights claim, than surely a state court does not engage in improper discrimination when it applies a forum-neutral tolling rule to a right created by the State. In the absence of

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suffered dismissal, section 1367(d) would allow the plaintiff another thirty days to refile in Minnesota's courts. Section 1367(d) would thus lead to a materially different result because a case was filed in federal rather than state court.

such discrimination, section 1367(d) is neither a necessary or proper exercise of Congress's Article III powers or any other provision of the Constitution.

CONCLUSION

The judgment of the Minnesota Supreme Court should be affirmed.

Respectfully submitted,

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